Supreme Court of the United States

OCTOBER TERM, 1944.

No. 207.

LENA ROSENMAN and THE NATIONAL CITY BANK OF NEW YORK, a Corporation, as Executors of the Last Will and Testament of Louis Rosenman, Deceased,

Petitioners,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONERS.

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THE COURT PRESS, N. Y. C.

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OPINION BELOW.

The opinion of the Court of Claims [R. 13] is reported in 53 F. Supp. 722.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925 (c. 229, 43 Stat. 939) as amended in 1939 by c. 140, 53 Stat. 752. The judgment of the Court of Claims was entered on April 3, 1944. The petition for writ of certiorari was filed June 29, 1944, and was granted October 9, 1944 [R. 19].

Question Presented.

Whether the claim for the refund of that portion of the estate tax here in question, was timely filed in accordance with the provisions of the following statute.

Statute Involved.

Section 319(b) of the Revenue Act of 1926, as amended by Section 810 of the Revenue Act of 1932 (47 Stat. 169), which as so amended provides as follows:

> "All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund."

Statement.

This is an action against the United States to recover part of an additional Federal estate tax which the Commissioner assessed against the petitioners in April, 1938, on the ground that such assessment was erroneous and illegal, in that the Commissioner failed to allow certain proper deductions in computing the amount of the net taxable estate. The Court of Claims held that *on the merits*, the petitioners would be entitled to recover the entire amount

claimed, namely, $23,122.58, but it limited their recovery to $10,497.34 on the ground that as to the balance of $12,625.24, the petitioners' claim for refund was not timely filed in accordance with the provisions of the above quoted statute [R. 13-18].

The facts in the case are not in dispute. The decedent died on December 25, 1933. On December 24, 1934, the petitioners as executors of his estate, (having previously obtained an extension of time to February 25, 1935, in which to file the Federal estate tax return) remitted to the Collector of Internal Revenue the sum of $120,000. The covering letter to the Collector enclosing this remittance said that it was "a payment on account of the Federal Estate Tax"; but it also pointed out that the remittance was *in excess* of the tax due [R. 7, last paragraph of letter].

Pending the filing of the estate tax return, the Collector placed the whole remittance to the *credit of the estate* in a "suspense" account known as Collector's Account #9 [R. 8]. On February 25, 1935, the petitioners filed the estate tax return showing that the estate tax due was $80,224.24 [R. 8]. Such tax was then assessed and this assessment was paid by the Collector's crediting against it the sum of $80,224.24 from the $120,000 which then stood to the credit of the estate in Account #9 [R. 8]. Thereupon, the Collector issued to the petitioners a formal receipt showing the payment of such tax and also showing that there remained a balance of $39,775.76 in said Account #9 to the credit of the estate [R. 8]. This balance, with the petitioners' acquiescence, was so retained by the Collector to the credit of the estate pending the Government's audit of the tax return [R. 8].

The Government took almost three years to audit

the return. Upon such audit the Commissioner determined that there was an additional tax due of $48,534.84 over and above the amount shown in the tax return [R. 8]. In April, 1938, the Commissioner assessed this additional tax against the petitioners, and the Collector applied in part payment thereof the balance of $39,775.76 which then stood to their credit in Account =9 [R. 9]. The claim for refund was filed on May 20, 1940, which was less than three years thereafter [R. 9, F 11].[1]

We contend that the statutory period of limitation commenced to run in April, 1938, when the Commissioner erroneously and illegally assessed the additional tax and the Collector transferred the said credit balance from the petitioners' account to the Government's account, in partial payment thereof.

The Court below held that the period of limitation commenced to run at the time of the original remittance of $120,000 in December, 1934, and that, therefore, the claim for refund was not timely filed.

Specification of Errors.

The Court of Claims erred in holding that petitioners' claim for refund was not filed within the three year period prescribed, by Section 319(b) of the Revenue Act of 1926, as amended by the Revenue Act of 1932, except as to the $10,497.34 for which judgment was entered below, and in limiting petitioners' recovery herein to said $10,497.34.

[1] The balance of the additional tax (after allowing for the said payment of $39,775.76) amounted, with interest, to $10,497.34, and concededly was paid by the petitioners on April 22, 1938 [R. 9]. The judgment below allows the recovery of this last mentioned sum so that no question arises with respect thereto [R. 8].

ARGUMENT.

I.

THE STATUTE WAS NOT INTENDED TO PRECLUDE RECOVERY IN A CASE LIKE THE PRESENT.

It seems to us apparent that in enacting the above statute Congress did not intend to preclude a taxpayer in a situation like that in the present case, from recovering money due to him from the Government. In *Kales* v. *United States*, CCA 3rd, 115 F. (2nd) 497, the Court said at page 500:

> "The prerequisite refunding statutes requiring claim for refund before suit, should receive a practical construction to effectuate their purpose."

The purpose of the statute is plain. Its function, like that of limitations generally, is to protect the Government against stale demands (*United States* v. *Memphis Oil Co.*, 288 U. S. 62, 71). Without some such statute the Government could never know what portion of taxes collected, definitely belonged to it, and thus the orderly administration of the public finances would be impossible.

The reason and purpose of the statute are wholly inapplicable to a situation like the one in the present case. Here the balance of $39,775.76 which remained in Account #9 pending the audit of the estate tax return, was being held by the Government during that period, *not* as moneys which belonged to it or to which it claimed to be entitled, but, on the contrary, as moneys which belonged to the petitioners and which the Government was holding with their con-

sent, for their account and to their credit [R. 8, F 5]. Not until April, 1938, when it was applied in partial payment of the additional tax which was then assessed, was the said balance carried in the Government's accounts as a tax collection [R. 9, F 9 and Point III, *infra*].

So long as the said balance remained in Account #9 to the credit of the petitioners there was no need or occasion for them to notify the Government of their claim of ownership. Such ownership was not disputed; it was acknowledged by the Government and shown in its own records [R. 8, F 5].

But furthermore, in April, 1938, prior to the assessment of the additional tax, there stood on the books of the Government a credit of $39,775.76 in favor of the petitioners. This credit the petitioners were then entitled to collect as an acknowledged indebtedness owing to them by the Government as shown by its own records and accounts. 28 USCA §250 (1); Judicial Code §145; *Ball* v. *United States*, 295 U. S. 247, at page 261; *United States* v. *State Bank*, 96 U. S. 30, at pages 35, 36. It was not then barred by limitation, for it was governed by the six-year statute (28 USCA §262; Judicial Code §156).

Therefore, in April, 1938, the Collector, in effect, seized this valid claim of the petitioners against the Government and applied it in partial payment of the additional tax which was then assessed.[2]

[2] According to the Government's contention, even if in April, 1938, the Commissioner on auditing the return had determined that it was correct as filed, the petitioners, nevertheless, would have been precluded by the statute here in question from recovering the balance of $39,775.76 which then stood to their credit in Account #9. This, we submit, is almost a *reductio ad absurdum*. For in the assumed case the additional tax would not have been assessed and hence the Collector would have had no authority to transfer said balance out of Account #9 in payment thereof.

II.

THE CAUSE OF ACTION ON WHICH PETITIONERS' CLAIM FOR REFUND WAS BASED, ACCRUED IN APRIL, 1938. HENCE THE STATUTORY PERIOD OF LIMITATION COMMENCED TO RUN AT THAT TIME.

The immediate source of Section 319(b) of the Revenue Act of 1926 (the statute here involved) was Section 3228 of the Revised Statutes. Section 3228 of the Revised Statutes, in turn, was derived from Section 44 of the Act of June 6, 1872 (17 Stat. 257), which apparently contained the first statutory limitation of time for presenting to the Commissioner of Internal Revenue claims for the refund of taxes (*Wright* v. *Blakeslee*, 101 U. S. 174, 179).

In fixing the time from which such period of limitation was to be measured, the 1872 Act used the phrase "within two years next after *the cause of action accrued*".* This same phrase was carried over into Section 3228 of the Revised Statutes of 1873-4 and remained in said section until 1921. The "cause of action" referred to was, of course, the cause of action on which the claim for refund was based.

By Section 1310 of the Revenue Act of 1921, the said period of limitation was enlarged from two to four years and in so amending Section 3228 of the Revised Statutes the present phrase "next after the payment of such tax" was substituted for the former phrase "next after the cause of action accrued". It is plain, however, that this change in phraseology was not intended to change the meaning or effect of Section 3228. At that time it was settled law that a tax could

* Italics ours throughout this brief.

not be recovered back, even though erroneous or illegal, unless it was paid under protest and duress. Necessarily, therefore, *such* payment fixed the time of accrual of the "cause of action" referred to in said section (*Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 204; *Public Service Corporation* v. *Herold*, 279 Fed. 352, 354).[3]

Hence, it seems apparent that in substituting the expression "next after the payment of such tax" for the older phrase theretofore used in Section 3228, namely, "next after the cause of action accrued", Congress did not intend to change the meaning or effect of said section, but was merely clarifying it (as it then seemed), by specifying the particular event which under the law as it then stood, fixed the *time of accrual* of the cause of action therein referred to.

As indicated above, the provisions of the statute here in question, namely, Section 319(b) of the Revenue Act of 1926, were derived directly from Section 3228 of the Revised Statutes, and it would seem entirely clear that the phrase "next after the payment of such tax" found in Section 319(b) was intended to have the same meaning and effect as the identical phrase in Section 3228 of the Revised Statutes.[4]

[3] It was not until 1924 that Congress for the first time enacted legislation which permitted a suit to be maintained for the recovery of a tax even though it had not been paid under protest and duress (Section 1014(a) of the Revenue Act of 1924 amending Section 3226 of the Revised Statutes dealing with suits for the recovery of taxes).

[4] By Section 1112 of the Revenue Act of 1926, Section 3228 of the Revised Statutes was amended so as to make it no longer applicable to the Federal estate tax, and Section 319(b), similar to Section 3228 but dealing exclusively with the Federal estate tax, was enacted. By said Section 319(b) the period of limitation was made three years instead of the four years prescribed by Section 3228 of the Revised Statutes.

In 1932 Congress added the last sentence of Section 319(b) as quoted above (p. 2) (Revenue Act of 1932, §810). The only purpose of the added sentence was to make it clear that the period of limitation with respect to any *portion* of the tax paid, began to run when the cause of action accrued as to such portion, and *not* when the cause of action accrued with respect to the *whole* amount of the tax that was recoverable (*cf. Hills* v. *United States*, 8 F. Supp. 849). Although the added sentence, in keeping with the phraseology theretofore used in the section and its predecessor section, speaks in terms of the payment of the tax, such terms were not intended to have a different meaning from similar terms in the same section,—which, as we have seen, refer to the accrual of the cause of action.

But, moreover, entirely aside from its historical background, the nature and function of the statute would, in themselves, lead to the same conclusion. For the statute in question is a statute of limitations. Its function, like that of limitations generally, is to protect against stale demands. (*United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71). In view of the nature and function of such a statute Congress could hardly have intended that the period of limitation should commence to run before the "cause of action" on which the claim for refund is predicated, accrued.

When, therefore, did such "cause of action" accrue, in the present case? The statute deals with claims for refund in respect of taxes which are "*alleged to have been erroneously or illegally assessed or collected*". This language presupposes that there has been some administrative action or determina-

tion which is alleged to be erroneous or illegal, in the assessment or collection of the tax. In other words, one of the necessary elements of the "cause of action" is the alleged erroneous or illegal action of the administrative officials in assessing or collecting the tax. Manifestly,[3] until the administrative officials have acted, the "cause of action" does not accrue.

At the time of the original remittance of $120,000 in December, 1934, neither the Commissioner nor the Collector took any action, or made or purported to make any determination, tentative or otherwise, in respect of the tax. They had no data before them on which to base any such determination or action. They were, therefore, holding any such determination or action *in abeyance* pending the filing of the return and, accordingly, the amount of the remittance was meanwhile being held in a "*suspense*" account to the credit of the estate [R. 7, 8, F 4, 5]. At that stage of the matter, there would be no basis for claiming that any action or determination of the administrative officials was erroneous or illegal. Nothing had been done by them except that the Collector had received the remittance from the petitioners in accordance with their request, and had placed it temporarily to their credit on his books pending the filing of the return.[3]

The Court below was of the opinion that the controlling question in the case was whether the original remittance of $120,000 was merely a "deposit" or an

[3] Surely the statute contemplated something more than this as a ground for charging the administrative officials of the Government with error or illegality in the discharge of their duties and subjecting them and the Government to suit. In reality, the administrative officials were withholding action in respect of the tax until the tax return had been filed.

advance payment of the tax [R. 15].[6] In this, we think the Court was in error. Whether the original remittance was a "deposit" or an advance payment of the tax, it, nevertheless, was not *the* "payment" contemplated by the statute. *It was not the payment of a tax in respect of which the Commissioner or Collector had made any determination or taken any action that was erroneous or illegal.* In other words, it was not a payment upon the making of which the "cause of action" contemplated by the statute, accrued.

The Court below said that if the original remittance had not been a payment of the tax, it could not have prevented the accrual of penalties and interest [R. 15]. It is respectfully submitted that this reasoning is fallacious. It overlooks that the phrase "next after the payment of such tax" contained in the statute, has the same meaning as its predecessor phrase "next after the cause of action accrued". Thus, there may be a "payment" which avoids interest and penalties but which, nevertheless, does not result in the accrual of the "cause of action" contemplated by the statute, because no administrative determination or action in respect of the tax has as yet been made or taken.

We respectfully submit, therefore, that the "cause of action" in question did not accrue at the time of the original remittance. When the tax return was filed in February, 1935, it showed a tax liability of $80,224.24. Thereupon the Commissioner assessed an estate tax against the petitioners in that amount and

[6] As shown in Point III of this brief, the administrative practice of the Government is to treat a remittance like the one here involved as being merely a "deposit", as distinguished from a tax payment, pending the filing of the tax return and the assessment of the tax thereby shown to be due.

the Collector paid such assessment by transferring the sum of $80,224.24 to the Government's account from the $120,000 then standing to the petitioners' credit on his books [R. 8]. This action of the Commissioner and the Collector was obviously neither erroneous nor illegal since the tax assessed and collected concededly was due.[7]

The petitioners' claim for refund here in question was based upon the erroneous and illegal action of the Commissioner in assessing the *additional* tax and of the Collector in transferring the said credit balance to the Government's account in payment thereof. This occurred in April, 1938, and hence the "cause of action" accrued at that time. The claim for refund was filed within three years thereafter, on May 20, 1940.

III.

THE GOVERNMENT'S ADMINISTRATIVE PRACTICE IS TO TREAT A REMITTANCE BY A TAXPAYER IN ADVANCE OF HIS FILING A TAX RETURN, AS MERELY A DEPOSIT.

Pending the filing of the tax return such a remittance is not carried in the Collector's accounts as a

[7] Neither were the administrative officials guilty at that time of any error or illegality in dealing with the balance which remained in Account #9 to the credit of the estate. They made no claim to this balance either as a tax collected or otherwise and they would have paid it over to the petitioners on request. On the other hand, the petitioners' claim against the Government in respect of said balance would be based upon its implied promise to pay the indebtedness owing to the petitioners according to the Government's own accounts (*Bull* v. *United States* and *United States* v. *State Bank*, both *supra*), which claim would be governed by the six-year statute (Judicial Code §156; 28 USCA §262). This valid claim was seized by the Collector in April, 1938, in payment of the additional tax.

tax collection, but is held to the *credit of the taxpayer* in a special account known as Account =9 [R. 7, F 4].

As long ago as April 14, 1933, the Comptroller General of the United States made a ruling that such a remittance, while in Account =9, was a "deposit" and not a tax payment (Vol. 1, Prentice-Hall Tax Service, 1935, Special Reports, par. 45). The case considered by the Comptroller General was similar to ours. The executors of an estate had obtained an extension of time in which to file the Federal estate tax return, and before filing the return they had remitted to the Collector of Internal Revenue the sum of $10,000 with which to pay such Federal estate tax as might be found to be due from the estate. The Comptroller General ruled that the remittance was a "*deposit* of $10,000 made in the nature of a cash bond to pay such taxes as might become due", and (referring to Collector's Account =9) he added that it "appears to have been so treated by the Collector of Internal Revenue who carried it in his accounts, not as a collection of taxes, but as a *deposit* for the payment of such taxes as might thereafter be found to be due".

In *Moses* v. *United States*, 28 F. Supp. 817 (1939), which involved a similar remittance, the Government stated in its brief:

> "The record shows that the $20,000 was covered into 'Account 9, unidentified' and that after the assessments, the correct amounts were transferred from Account 9 into the regular accounts in payment of the assessments. Throughout the Collector treated the payment of $20,000 as a *deposit* to be applied to the payment of taxes when they should be assessed." (Government's Supp. Br. p. 9.)

Dealing with a similar remittance in *Atlantic Oil Producing Co. v. United States*, 35 F. Supp. 765 (1940), the Government said in its brief at p. 26:

> "They [the Commissioner of Internal Revenue and the Collector] both used the regular form and procedure, notwithstanding the fact that the deposit by plaintiff was *sui generis* so far as normal tax-collection practice is concerned. The Collector did the only thing he could to indicate that the deposit was not a normal tax payment when he credited it to Suspense Account 9. *That action once and for all served to distinguish it from a tax payment.* What happened afterwards in the way of covering it into the Treasury, *et cetera*, is unimportant."

And again in *Busser v. United States*, 130 F. (2d) 537 (CCA 3d, 1942), where the procedure followed by the taxpayer and the Collector was also substantially the same as in the present case, the Government's brief stated:

> "* * * Nor did either of the parties treat the transaction as a payment. Rather the trustee [i. e., the taxpayer], in delivering the check, simply requested the Collector to apply it 'on account of the tax * * * ultimately shown to be due by the Estate Tax Return when filed,' and, in turn, the Collector did not give a receipt on the usual form used for tax payment. Instead, the Collector acknowledged receipt of Price's [the taxpayer's] letter and promised a receipt upon the filing of the return, and, significantly, he treated the check not as a normal tax payment but credited it to Unidentified Account (Account 9). *It is, therefore abundantly clear, from the parties' own treatment of the transaction that the*

mutual intention requisite to constitute payment was absent here.

* * * *

"* * * Rather, the transaction was in the nature of a cash bond to secure or protect the liability of decedent's estate and to forestall the running of interest against it." (Government's Br. pp. 11-13.)

In all three of the above cases, the specific question involved was as to the Government's liability for interest on that part of the deposit which had become refundable to the taxpayer, after his return was filed and his tax liability discharged. In the *Moses* and *Busser* cases, *supra*, the Court upheld the Government's contention that no interest was payable; on the other hand, in the *Atlantic Oil Producing Co.* case, *supra*, the Court of Claims reached a contrary conclusion; but in none of the cases did the Court question the accuracy of the Government's statements concerning the administrative practice of treating such a remittance as being merely a "deposit" pending the filing of the tax return.

Furthermore, it is the practice of the Government, not to claim interest or penalties on so much of the tax as is covered by such a deposit. This encourages taxpayers to make such deposits and accomplishes a just result. For during the period of the deposit the Government has the full use of the money and, of course, it does not pay interest on that portion of the deposit which subsequently is applied in payment of the tax. Thus, for practical purposes, the Government is in the same position as if the tax had been fixed and paid at the time of the deposit. This administrative practice appears never to have been

questioned. The question that has arisen is as to the Government's liability for interest on the surplus of the deposit which eventually becomes refundable to the taxpayer. That was the question litigated in the above three cases. But, although the Government contended in those cases that the remittance was a deposit, it did not question that the effect of such a deposit was to forestall interest and penalties.

The suggestion of the Commissioner, in his letter to the petitioners dated December 15, 1934 [R. 6, 7], that they make a payment on account of the tax in order to avoid interest and penalties, should be read in the light of the above administrative practice. When so read, his suggestion, though inartificially worded, in effect, was that the petitioners should make the *type* of payment which would avoid interest and penalties, that is to say, a deposit.

IV.

THE PETITIONERS POINTED OUT IN THEIR LETTER TO THE COLLECTOR THAT THE $120,000 WAS IN EXCESS OF THE AMOUNT DUE.

In the course of its opinion the Court below said that the *whole* original remittance of $120,000 "was a payment of the amount of tax estimated to be due" [R. 15]. This, we respectfully submit, is incorrect. The petitioners' letter transmitting the $120,000, in effect pointed out that it was *in excess* of the tax which they considered to be due. Although it is true that the letter stated that the $120,000 was being delivered as a "payment on account of the Federal estate tax," the letter also added that "* * * *it is contended*

by the executors that not all of this sum is legally or lawfully due" [R. 7, last paragraph of letter].

It is apparent, therefore, that the petitioners in their said letter did *not* purport to estimate the amount of tax that was due. Such estimate was furnished for the first time when shortly thereafter they filed with the Collector the estate tax return showing the tax liability to be $80,224.24 [R. 8, F 5]. Thus, when the letter and the return are read together, their combined result was to inform the Collector that of the $120,000 originally remitted, only $80,224.24 was in payment of petitioners' estimate of the tax due, and that the excess of $39,775.76 was to be held for their account and to their credit under the administrative procedure hereinbefore referred to. *And this is exactly how the Collector actually treated the remittance* [R. 8, F 5, 6].

CONCLUSION.

THE JUDGMENT BELOW SHOULD BE MODIFIED BY INCREASING THE AMOUNT TO $23,122.58.

Respectfully submitted,

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